

JSW 530 2008  
COURT OF APPEAL  
FILED  
MAY 2008  
16

**PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY**

1 Name HARRY ELDRIDGE  
 2 (Last) (First) (Initial)

3 Prisoner Number H-06424

4 Institutional Address P.O. BOX 409060, IONE, CA. 95640

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

5 HARRY ELDRIDGE,

6 (Enter the full name of plaintiff in this action.)

CV 08  
4483

JSW

7 vs.

8 RICHARD SUBIA, (Warden),

9 Case No. \_\_\_\_\_  
 (To be provided by the clerk of court)

10 Mule Creek State Prison,

11 PETITION FOR A WRIT  
12 OF HABEAS CORPUS

13 (Enter the full name of respondent(s) or jailor in this action)

14 (SENTENCING ONLY)

(PR)

15 Read Comments Carefully Before Filling In

16 When and Where to File

17 You should file in the Northern District if you were convicted and sentenced in one of these  
 18 counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa,  
 19 San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo and Sonoma. You should also file in  
 20 this district if you are challenging the manner in which your sentence is being executed, such as loss of  
 21 good time credits, and you are confined in one of these counties. Habeas L.R. 2254-3(a).

22 If you are challenging your conviction or sentence and you were not convicted and sentenced in  
 23 one of the above-named fifteen counties, your petition will likely be transferred to the United States  
 24 District Court for the district in which the state court that convicted and sentenced you is located. If  
 25 you are challenging the execution of your sentence and you are not in prison in one of these counties,  
 26 your petition will likely be transferred to the district court for the district that includes the institution  
 27 where you are confined. Habeas L.R. 2254-3(b).

### Who to Name as Respondent

You must name the person in whose actual custody you are. This usually means the Warden or  
jailor. Do not name the State of California, a city, a county or the superior court of the county in which  
you are imprisoned or by whom you were convicted and sentenced. These are not proper  
respondents.

If you are not presently in custody pursuant to the state judgment against which you seek relief but may be subject to such custody in the future (e.g., detainers), you must name the person in whose custody you are now and the Attorney General of the state in which the judgment you seek to attack was entered.

**10 A. INFORMATION ABOUT YOUR CONVICTION AND SENTENCE**

11 1. What sentence are you challenging in this petition?

12 (a) Name and location of court that imposed sentence (for example; Alameda  
13 County Superior Court, Oakland):  
14 Santa Clara County Superior Court, San Jose, CA.

15                          Court                          Location  
16                          (b) Case number, if known 142464  
17                          (c) Date and terms of sentence 7/26/91; 84 yrs.  
18                          (d) Are you now in custody serving this term? (Custody means being in jail, on  
19                          parole or probation, etc.)                  Yes    XX      No

20 | Where?

21 Name of Institution: Mule Creek State Prison

Address: Ione, CA. 95640

23        2. For what crime were you given this sentence? (If your petition challenges a sentence for  
24 more than one crime, list each crime separately using Penal Code numbers if known. If you are  
25 challenging more than one sentence, you should file a different petition for each sentence.)

26 AS SET FORTH HEREIN.

1     3. Did you have any of the following?

2              Arraignment: Yes XX No \_\_\_\_\_

3              Preliminary Hearing: Yes XX No \_\_\_\_\_

4              Motion to Suppress: Yes XX No \_\_\_\_\_

5     4. How did you plead?

6              Guilty \_\_\_\_\_ Not Guilty XX Nolo Contendere \_\_\_\_\_

7              Any other plea (specify) \_\_\_\_\_

8     5. If you went to trial, what kind of trial did you have?

9              Jury XX Judge alone \_\_\_\_\_ Judge alone on a transcript \_\_\_\_\_

10    6. Did you testify at your trial? Yes XX No \_\_\_\_\_

11    7. Did you have an attorney at the following proceedings:

12       (a) Arraignment Yes XX No \_\_\_\_\_

13       (b) Preliminary hearing Yes XX No \_\_\_\_\_

14       (c) Time of plea Yes XX No \_\_\_\_\_

15       (d) Trial Yes XX No \_\_\_\_\_

16       (e) Sentencing Yes XX No \_\_\_\_\_

17       (f) Appeal Yes XX No \_\_\_\_\_

18       (g) Other post-conviction proceeding Yes \_\_\_\_\_ No XX

19    8. Did you appeal your conviction? Yes XX No \_\_\_\_\_

20       (a) If you did, to what court(s) did you appeal?

21              Court of Appeal Yes X No \_\_\_\_\_

22              Year: 1994 Result: SENTENCE MODIFICATION \_\_\_\_\_

23              Supreme Court of California Yes XX No \_\_\_\_\_

24              Year: 1994 Result: DENIED \_\_\_\_\_

25              Any other court Yes \_\_\_\_\_ No XX

26              Year: \_\_\_\_\_ Result: \_\_\_\_\_

28       (b) If you appealed, were the grounds the same as those that you are raising in this

1 petition? Yes \_\_\_\_\_ No \_\_\_\_\_

2 (c) Was there an opinion? Yes \_\_\_\_\_ No \_\_\_\_\_

3 (d) Did you seek permission to file a late appeal under Rule 31(a)?

4 Yes \_\_\_\_\_ No XX

5 If you did, give the name of the court and the result:

6 \_\_\_\_\_  
7 \_\_\_\_\_

8 9. Other than appeals, have you previously filed any petitions, applications or motions with respect to  
9 this conviction in any court, state or federal? Yes XX No \_\_\_\_\_

10 [Note: If you previously filed a petition for a writ of habeas corpus in federal court that  
11 challenged the same conviction you are challenging now and if that petition was denied or dismissed  
12 with prejudice, you must first file a motion in the United States Court of Appeals for the Ninth Circuit  
13 for an order authorizing the district court to consider this petition. You may not file a second or  
14 subsequent federal habeas petition without first obtaining such an order from the Ninth Circuit. 28  
15 U.S.C. §§ 2244(b).]

16 (a) If you sought relief in any proceeding other than an appeal, answer the following  
17 questions for each proceeding. Attach extra paper if you need more space.

18 I. Name of Court: SEE PROCEDURAL HISTORY, BELOW.

19 Type of Proceeding: HABEAS CORPUS

20 Grounds raised (Be brief but specific):

21 a. SEE PROCEDURAL HISTORY, BELOW.

22 b. \_\_\_\_\_

23 c. \_\_\_\_\_

24 d. \_\_\_\_\_

25 Result: \_\_\_\_\_ Date of Result: \_\_\_\_\_

26 II. Name of Court: \_\_\_\_\_

27 Type of Proceeding: \_\_\_\_\_

28 Grounds raised (Be brief but specific):

1 a. \_\_\_\_\_

2 b. \_\_\_\_\_

3 c. \_\_\_\_\_

4 d. \_\_\_\_\_

5 Result: \_\_\_\_\_ Date of Result: \_\_\_\_\_

6 III. Name of Court: \_\_\_\_\_

7 Type of Proceeding: \_\_\_\_\_

8 Grounds raised (Be brief but specific):

9 a. \_\_\_\_\_

10 b. \_\_\_\_\_

11 c. \_\_\_\_\_

12 d. \_\_\_\_\_

13 Result: \_\_\_\_\_ Date of Result: \_\_\_\_\_

14 IV. Name of Court: \_\_\_\_\_

15 Type of Proceeding: \_\_\_\_\_

16 Grounds raised (Be brief but specific):

17 a. \_\_\_\_\_

18 b. \_\_\_\_\_

19 c. \_\_\_\_\_

20 d. \_\_\_\_\_

21 Result: \_\_\_\_\_ Date of Result: \_\_\_\_\_

22 (b) Is any petition, appeal or other post-conviction proceeding now pending in any court?

23 Yes        No XX

24 Name and location of court: \_\_\_\_\_

25 B. GROUNDS FOR RELIEF

26 State briefly every reason that you believe you are being confined unlawfully. Give facts to  
27 support each claim. For example, what legal right or privilege were you denied? What happened?  
28 Who made the error? Avoid legal arguments with numerous case citations. Attach extra paper if you

1 need more space. Answer the same questions for each claim.

2 [Note: You must present ALL your claims in your first federal habeas petition. Subsequent  
3 petitions may be dismissed without review on the merits. 28 U.S.C. §§ 2244(b); McCleskey v. Zant,  
4 499 U.S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991).]

5 Claim One: AS SET FORTH HEREIN

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7 Supporting Facts:

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11 Claim Two:

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13 Supporting Facts:

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16 Claim Three:

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18 Supporting Facts:

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23 If any of these grounds was not previously presented to any other court, state briefly which  
24 grounds were not presented and why:

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1 List, by name and citation only, any cases that you think are close factually to yours so that they  
2 are an example of the error you believe occurred in your case. Do not discuss the holding or reasoning  
3 of these cases:

4 AS SET FORTH HEREIN  
5 \_\_\_\_\_  
6 \_\_\_\_\_  
7 Do you have an attorney for this petition? Yes \_\_\_\_\_ No XX  
8 If you do, give the name and address of your attorney:  
9 \_\_\_\_\_

10 WHEREFORE, petitioner prays that the Court grant petitioner relief to which s/he may be entitled in  
11 this proceeding. I verify under penalty of perjury that the foregoing is true and correct.

12 Executed on 5-22-08  
13 Date

Harvey Beddoe  
Signature of Petitioner

20 (Rev. 6/02)

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## **STATEMENT OF THE CASE**

In an amended information filed on January 4, 1991, the District Attorney of Santa Clara County charged Harry Lee Eldridge (Petitioner from this point forward), as follows:

Counts 1 and 2 charged crimes against Yvonne Davis in March of 1989. Count 1 charged False Imprisonment, (Penal Code § 236), and Count 2 charged forcible oral copulation, (P.C. § 288a(c)). /1.

Counts 3 through 10 charged crimes against Kathy Jurek and which were allegedly committed in March of 1990. Counts 3 and 4 charged Assault With a Deadly Weapon Other Than a Firearm, (P.C. § 245(a)). Counts 5 and 6 charged Rape, (accomplished by force or fear) (P.C. § 261(2)). Counts 7 and 8 charged Forcible Oral Copulation, (P.C. § 288a(c)). Count 9 charges dissuading a Witness, (P.C. § 136.1(c)(1)). Count 10 charges False Imprisonment, (P.C. § 236).

Counts 11 through 22 charged crimes against Elizabeth Simone committed in August of 1990. Counts 11 and 12 charges Assault With a Deadly Weapon Other Than a Firearm, (P.C. § 245(a)) Counts 13, 14, and 15 charged Rape, (accomplished with force or fear) (P.C. § 261(2)). Count 16 charged Dissuading a Witness, (P.C. § 136(c)(1)). Count 17 charged Kidnapping, (P.C. § 207). Count 18 charged Meyhem, (P.C. 203). Counts 20, 21, and 22 charged Forcible Oral Copulation, (P.C. 288(c)). (CT. 193-204, 222)<sup>2</sup>.

Jury trial began on April 18, 1991. (CT. 235) On May 3, 1991 the jury returned verdicts of guilty on all counts except for acquittals on counts

1.) Unless otherwise indicated all further statutory references are to the California Penal Code and shall be denoted "P.C.".

2.) CT.: Court Transcripts: RT.: Reporter's Transcripts.

1 1, 2, 3, 17, and 18. (RT. 822-839.)

2 On July 26, 1991 petitioner was sentenced to an aggregate term of impri-  
3 sonment of ninety years. (CT. 389-390.) Petitioner filed timely Notice of  
4 Appeal on July 31, 1991. (CT. 393.)

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1                   PROCEDURAL HISTORY

2                   On July 26, 1991 the petitioner was sentenced to a term of imprisonment  
3 of ninety years. An appeal followed in the Sixth Appellate District of the  
4 State of California (H008751) That court affirmed the conviction but remanded  
5 for resentencing because the sentencing court had erred in sentencing  
6 petitioner under a specific mandatory sentencing statute as to the sexual  
7 assault counts. (Court of Appeal Slip Op. pgs. 33-35 are appended hereto.)

8                   A Petition for Review was filed in connection with this first appeal.  
9 That petition was denied via remittitur on August 17, 1993.

10                  On March 4, 1994 petitioner was resentenced to an aggregate term of  
11 eighty four year. (CT. 59-59A)

12                  A second appeal was denied in full on March 3, 1995. A second Petition  
13 for Review was also denied in full on March 3, 1995.<sup>/3</sup> (H012372)

14                  On July 12, 2002 Petitioner filed his first Petition For Writ of Habeas  
15 Corpus in the trial court raising various claims of ineffective assistance  
16 of trial counsel. These issues are not relevant to the matters addressed  
17 herein and are therefore omitted. On October 10, 2003 the California Supreme  
18 Court denied petitioner's habeas petition which raised the same matters  
19 as were raised in the trial court.

20                  On January 9, 2004 petitioner filed a Petition For Writ of Habeas Corpus  
21 in the United States District Court for the Northern District of California  
22 raising various claims of trial error and ineffective assistance of trial  
23 counsel. (C:04-cv-0088 JSW (PR).) The claims presented therein are not  
24 relevant to the matters addressed herein. This petition was denied as

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27                  3. Petitioner has omitted the issues which were raised on first and  
second appeal because they are not relevant to the matters presented herein,  
(sentencing only) and for the sake of judicial economy.

1 untimely under the Antiterrorism and Effective Death Penalty Act of 1996  
2 ("AEDPA") on October 3, 2005.

3 On March 12, 2007 petitioner began second series of habeas corpus  
4 petitions in state courts by presenting a petition to the sentencing court  
5 raising the following claim:

6 Claim I

7 PETITIONER WAS DENIED HIS RIGHT TO A JURY TRIAL UPON  
8 FACTS NECESSARY TO IMPOSE AGGRAVATED TERMS AND CONSECUT-  
9 IVE SENTENCES IN VIOLATION OF THE SIXTH AND FOURTEENTH  
AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND  
ARTICLE I, §§ 15 AND 24 OF THE CONSTITUTION OF THE STATE  
OF CALIFORNIA.

10 Claim II

11 THE SENTENCING COURT VIOLATED STATE AND FEDERAL PROHIB-  
12 ICTIONS AGAINST EX POST FACTO LAWS BY APPLYING RULE 426  
13 OF THE CALIFORNIA RULES OF COURT TO THE INSTANT MATTER  
WHEN MAKING SENTENCING DETERMINATIONS AND IMPOSING  
SENTENCE.

14 Claim III

15 UPON RESENTENCING THE TRIAL COURT EXCEEDED IT'S JURIS-  
16 DICTION, AND VIOLATED PETITIONER'S STATE AND FEDERAL  
RIGHT TO DUE PROCESS OF THE LAW AND TO NOT BE TWICE  
PUT IN JEOPARDY FOR THE SAME OFFENSE.

17 Claim IV

18 PETITIONER WAS DENIED HIS STATE AND FEDERAL RIGHT TO  
19 DUE PROCESS AND EQUAL PROTECTION OF THE LAW WHEN THE  
TRIAL COURT FAILED TO STATE REASONS ON THE RECORD FOR  
IMPOSING THE AMOUNT SPECIFIED AS A RESTITUTION FINE.

21 Claim V

22 PETITIONER WAS DENIED HIS RIGHT TO THE EFFECTIVE  
ASSISTANCE OF TRIAL COUNSEL UNDER ARTICLE I, §§ 15 AND  
23 24 OF THE CALIFORNIA STATE CONSTITUTION, AND; THE SIXTH  
AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

24 Claim VI

25 PETITIONER SUFFERED INEFFECTIVE ASSISTANCE OF COUNSEL  
26 ON DIRECT APPEAL IN VIOLATION OF HIS RIGHT TO COUNSEL  
PURSUANT TO THE SIXTH AMENDMENT OF THE CONSTITUTION  
OF THE UNITED STATES, AND; ARTICLE I, §§ 15 AND 24

1                   OF THE CONSTITUTION OF THE STATE OF CALIFORNIA.

2       These claims were presented to the sentencing court and denied on March  
3       12, 2007. The order of denial is appended hereto and identified as exhibit  
4       A. The writ petition presenting these claims to the California Court of  
5       Appeal, Sixth Appellate District was denied on May 2, 2007. See exhibit  
6       B. The California Supreme Court denied the habeas petition presenting these  
7       claims on October 10, 2007. See exhibit C.

8       Petitioner then presented these claims in a second petition for writ  
9       of habeas corpus to the United States District Court, Northern District  
10      of California. (C 07-5650 JSW (PR)) This petition was dismissed with leave  
11      to seek an order from the United States Court of Appeal granting permission  
12      to file a second or successive petition pursuant to 28 U.S.C. § 2244(b)(3)(A).  
13      See exhibit D.

14       Petitioner then filed a motion requesting the correction of an unauth-  
15      orized sentence in the sentencing court on December 31, 2007. This motion  
16      was denied on January 29, 2008. See exhibit E.

17       Petitioner then sought to compel the trial court to correct his sentence  
18      by seeking a writ of mandate in the California Court of Appeal, Sixth Appel-  
19      late District. The Petition For Writ of Mandate was denied on February 15,  
20      2008. See exhibit F.

21       Petitioner sought review in the California Supreme Court and was denied  
22      on April 9, 2008. See Exhibit G. /4.

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27       4.) It must be noted that no state court has denied any petition  
          presented in this case on procedural grounds.

MEMORANDUM OF ARGUMENT AND AUTHORITIES

1      INCORPORATION OF RECORDS AND DOCUMENTS:

2            Petitioner hereby incorporates into this petition all documents appended  
3 hereto and identified as exhibits and which are offered in support of this  
4 petition. Petitioner further hereby incorporates into this petition all docu-  
5 ments, records, and transcripts of proceedings, both Reporter's and Clerk',  
6 of the record on appeal and which are presently on file in the California  
7 Court of Appeal, Sixth Appellate District, in case numbers H008751 and H012372,  
8 and on file in the Superior Court for the State of California, in and for  
9 the County of Santa Clara in case number 142464.

10         REQUEST FOR LIBERAL CONSTRUCTION AND INTERPRETATION:

11           Petitioner requests leave of this court to file this petition with liberal  
12 interpretation and construction standards pursuant to the holding of the United  
13 States Supreme Court in **Hains v. Kerner**, 404 US 519; **Boag v. McDougal**, 454  
14 US 364.

15         JURISDICTION:

16           The issues raised herein are properly presented to this Honorable in  
17 a petition for writ of habeas corpus in that petitioner is seeking remedy  
18 for denial of fundamental constitutional rights and errors in sentencing only  
19 which constitute a denial of due process of law and a fundamental miscarriage  
20 of justice. As set forth herein petitioner claims exceptions to successive  
21 petition and timeliness procedural bars which, if correct, bestow this court  
22 with jurisdiction on this matter.

1                   ADDRESSING POSSIBLE PROCEDURAL IMPEDIMENTS

2                   SUCCESSIVE PETITIONS:

3                   Petitioner concedes that this petition qualifies as a successive petition  
 4                   within the language of the AEDPA. However, petitioner asserts that this  
 5                   court holds jurisdiction over this matter under the "exceptions" to the  
 6                   successive petition ban established by the United States Supreme Court in  
 7                   **Tyler v. Cain** (2001) 533 US 656, 661. The exceptions to the ban on successive  
 8                   petitions permit review of a claim that has not been previously litigated  
 9                   if "the facts underlying the claim would be sufficient to establish by clear  
 10                  and convincing evidence that but for constitutional error no reasonable fact-  
 11                  finder would have found the applicant guilty of the underlying offense."

12                  **28 U.S.C. § 2254(B)**

13                  The matters presented herein have not previously been litigated. Further,  
 14                  petitioner establishes herein, by clear and convincing evidence that but  
 15                  for constitutional error no reasonable factfinder would have found petitioner  
 16                  guilty and imposed the sentence imposed.

17                  CAUSE AND PREJUDICE STANDARD:

18                  In **Coleman v. Thompson** (1991) 501 US 722 the United States Supreme Court  
 19                  held that a Sixth Amendment violation of ineffective assistance of counsel  
 20                  overcomes all procedural bars under the "Cause and Prejudice Standard".

21                  ". . . , as Carrier explains, 'if the procedural default  
 22                  is the result of ineffective assistance of counsel, the  
 23                  Sixth Amendment itself requires that the responsibility  
 24                  for the default be imputed to the State.' 477 U.S. at  
 25                  488.'" [Citation omitted.] "In other words, it is not  
 26                  the gravity of the attorney's error that matters, but  
 27                  that it constitutes a violation of petitioner's right  
                       to counsel, so that the error must be seen as an external  
                       factor, i.e., 'imputed to the State.' See also **Evitts**  
                       v. **Lucey**, 469 U.S. 387, 396 L.Ed.2d 821, 105 S.Ct. 830  
                       (1985)' The constitutional mandate [guaranteeing effective  
                       assistance of counsel] is addressed to the action of  
                       the State in obtaining a criminal conviction through

1           a procedure that fails to meet the standard of due process  
 2           of law." **Coleman v. Thompson** 501 U.S. 722, 754; quoting  
 3           first **Murray v. Carrier** (1986) 477 U.S. 478, then **Evitts**  
 4           **v. Lucey, supra.**

5           This standard survives enactment of the AEDPA. See **Edwards v. Carpenter**  
 6           (2000) 529 U.S. 446.

7           In **Coleman v. Thompson, supra**, the United States Supreme Court determined  
 8           that the petitioner's trial counsel was constitutionally defective for failing  
 9           to file a timely Notice of Appeal and thereby defaulting the petitioner's  
 10          post-conviction remedies. Since counsels performance fell below constitutional  
 11          standards he was no longer acting as an agent for the defendant therefore  
 12          the defendant was no longer bound by the acts and/or omissions of an agent,  
 13          (See Restatement (Second) of Agency § 242 (1958)). In the **Coleman** case defense  
 14          counsel merely failed to open the door by which the petitioner might seek  
 15          post conviction remedies, whereas in the instant matter, as set forth herein,  
 16          trial and appellate counsel's acts and omissions have closed and locked the  
 17          door on petitioner's efforts to gain post conviction remedy on matters pres-  
 18          ented herein.

19           FUNDAMENTAL MISCARRIAGE OF JUSTICE:

20           A petitioner who cannot show cause and prejudice may yet present a pro-  
 21          cedurally defaulted claim if her or she can demonstrate that a constitutional  
 22          error has caused a fundamental miscarriage of justice. See: **Wainwright v**  
 23          **Sykes** (1977) 433 US 72, 91. The fundamental miscarriage of justice standard  
 24          applies to the sentencing determination as well as to the adjudication of  
 25          guilt. See **Dugger v Adams** (1989) 489 US 401, 412 n6. Also **Sawyer v. Whitley**  
 26          (1992) 505 US 333, at 336: "[the fundamental miscarriage of justice standard]  
 27          . . . which permits consideration of successive, abusive, or defaulted sent-  
           encing-related claims only if the petitioner show[s] by clear and convincing

1 evidence". In the instant case it is a fundamental miscarriage of justice  
2 that petitioner's restitution fine was increased upon remand for resentencing,  
3 as addressed herein.

4 TIMELINESS:

5 Regarding the timeliness of this petition petitioner asserts that this  
6 petition for writ of habeas corpus is not untimely under the standards of  
7 the AEDPA, which provides a one year time limit to file a federal petition  
8 from either the conclusion of direct review or the expiration of the time  
9 for seeking review. (See 28 U.S.C. § 2244(d)(1)) Because this petition does  
10 not question determinations of guilt, and only seeks the correction of an  
11 unlawful sentence, the one year time limit was not triggered until April  
12 9, 2008, the date review was denied by the California Supreme Court. (See  
13 exhibit G.) As to the period of time between imposition of sentence and denial  
14 of the petition for review by the California Supreme Court ... that period  
15 must be tolled because there is no time limit in the State of California  
16 to seek correction of an unlawful sentence, An unauthorized sentence may  
17 be corrected at any time even without objection. See **People v. Chagolla** (1983)  
18 **144 C3d 422; People v. Scott** (1994) **9 C4th 331.**

19  
20 For the reasons set forth above this petition is properly presented  
21 to this Honorable Court.  
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**CLAIM I**

UPON RESENTENCING THE TRIAL COURT EXCEEDED IT'S JURISDICTION, AND VIOLATED PETITIONER'S STATE AND FEDERAL RIGHT TO DUE PROCESS OF THE LAW AND NOT TO BE TWICE PUT IN JEOPARDY FOR THE SAME OFFENSE.

## Controlling Principals of Law:

The Fifth Amendment to the Constitution of the United States and Article I, §§ 15 and 24 of the California State Constitution protect a criminal defendant from twice being placed in jeopardy. The 14th Amendment to the Federal Constitution, and Article I, §§ 15 and 24 of the State Constitution guarantee a criminal defendant due process of the law. Federal Constitutional guarantees are attached to the States through the 14th Amendment of the Constitution of the United States.

### **Relevant Facts and Argument:**

At the original sentencing hearing, which occurred on July 26, 1991, petitioner was ordered to pay a Restitution Fine in the amount of \$100.00. (RT. p 855:13-14; also see Petitioner's attached exhibit H) Upon resentencing petitioner was ordered to pay a Restitution Fine in the amount of \$1,000.00. A ten-fold increase. (RT. p. 21:7-8; also see Petitioner's attached exhibit I) Petitioner now argues that the trial court exceeded it's jurisdiction in imposing an increased Restitution Fine after the matter was appealed and directed back to the sentencing court for resentencing on matters not effecting the validity of the original Restitution Fine imposed. In doing so the trial court violated petitioners federal and state right to due process of the law and not to be twice put in jeopardy.

Purely for the sake of this argument petitioner asserts that the original Restitution Fine was properly imposed pursuant to the law which controlled

1 the matter at the period of time effected. The offenses which are the basis  
 2 of the judgment in question here occurred in 1990. Therefore, it is the law  
 3 as it existed at that time which controls this matter.

4           **§ 1202.4. Restitution fine; felony convictions; waiver;**  
 5           **probation.**

6           (a) In any case in which a defendant is convicted  
 7 of a felony, the court shall order the defendant to pay  
 8 a restitution fine as provided in subdivision (a) of  
 9 Section 13967 of the Government Code. Such restitution  
 10 fine shall be in addition to any other penalty or fine  
 11 imposed and shall be ordered regardless of the defendant's  
 ability to pay. However, if the court finds that there  
 are compelling and extraordinary reasons, the court may  
 waive imposition of the fine. When such a waiver is  
 granted, the court shall state on the record all reasons  
 supporting the waiver. **West's California Penal Code,**  
**1990 Compact Edition.**

12 Government Code § 13967 (a), Provides:

13           (a) Upon a person being convicted of any crime  
 14 in the State of California, the court shall, in addition  
 15 to any other penalty provided or imposed under the law,  
 16 order the defendant to pay restitution in the form of  
 17 a penalty assessment in accordance with Section 1464  
 18 of the Penal Code. In addition, if the person is convicted  
 19 of one or more felony offenses, the court shall impose  
 20 a separate and additional restitution fine of not less  
 21 than one hundred dollars (\$100) and not more than ten  
 22 thousand dollars (\$10,000). In setting the amount of  
 23 the fine for felony convictions, the court shall consider  
 24 any relevant factors including, but not limited to,  
 25 the seriousness and gravity of the offense and the cir-  
 cumstances of its commission, any economic gain derived  
 by the defendant as a result of the crime, and the extent  
 to which others suffered losses as a result of the crime.  
 Such losses may include pecuniary losses to the victim  
 or his or her dependents as well as intangible losses,  
 such as psychological harm caused by the crime. Except  
 as provided in Section 1202.4 of the Penal Code and sub-  
 division (c) of this section, under no circumstances  
 shall the court fail to impose the separate and additional  
 restitution fine required by this section. This fine  
 shall not be subject to penalty assessments as provided  
 in Section 1464 of the Penal Code.

26           Petitioner is cognizant of the language contained in the opinion of  
 27 the state Court of appeal (See Petitioner's exhibit J) wherein the court

1 said: "The sentence is vacated, and the matter is remanded for complete  
2 resentencing in accordance with the law." California courts have held that  
3 if an unauthorized sentence is imposed and the case is remanded for resenten-  
4 cing the defendant runs the risk of having a greater sentence imposed. See  
5 **People v. Serrato** (1973) 90 Cal.3d 753, 763. However, only that portion of the  
6 sentence which is unauthorized may be effected. The lawful portion of the  
7 sentence remains unaffected. See **People v. Price** (1986) 184 Cal.3d 1405. In  
8 cases remanded for retrial the "Henderson Rule" controls. (See **People v.**  
9 **Henderson** (1963) 60 Cal.2d 482) The Henderson Rule bars imposition of a greater  
10 sentence than originally imposed after retrial following a successful appeal  
11 based upon State Constitutional prohibitions against double jeopardy. Admitt-  
12 edly, at first glance, federal courts have interpreted federal Constitutional  
13 prohibitions against double jeopardy to be less protective. In **North Carolina**  
14 **v. Pearce** (1969) 395 U.S. 711 the United States Supreme Court held that the  
15 federal double jeopardy clause "imposes no restrictions upon the length of  
16 a sentence imposed upon reconviction". (**Pearce** at 719) However, Petitioner  
17 asserts that this matter is distinctive from the "Pearce" line of reasoning.  
18 Petitioner's resentencing did not follow retrial. The facts upon which deter-  
19 minations of guilt were not relitigated in a new or different trial. Only  
20 an erroneous portion of the sentence was corrected based upon the sentencing  
21 court's having originally sentenced petitioner under an inapplicable sentenc-  
22 ing statute. See Petitioner's exhibit J, pages 33-35. The imposed Restitution  
23 Fine portion of the judgment was not impacted by the reversal in the Califor-  
24 nia Court of Appeal.

25 In California the Restitution Fine portion of the judgment is "punish-  
26 ment" for the purposes of California's Constitutional prohibition against  
27 double jeopardy which precludes the imposition of more severe punishment

1 upon resentencing. See **People v. Henderson** (1963) 60 Cal.2d 495-497; and  
2 **People v. Hanson** 23 Cal.4th 355. Federal double jeopardy attaches to the  
3 instant matter because the resentencing court relitigated matters which were  
4 not at issue and which had previously been litigated at the original sentencing  
5 hearing.

6 The statute controlling Restitution Fine sentencing determinations  
7 at the time of petitioner's sentencing was Government Code § 13967 (See above)  
8 which set forth the factors the sentencing court is required to consider  
9 in determining the amount of the Restitution Fine to impose. Those factual  
10 determinations were made at petitioner's original sentencing hearing and  
11 based upon those determinations the court imposed a Restitution Fine of  
12 \$100.00. At the resentencing hearing the court utilized the same 1991  
13 Probation Report as utilized at the original sentencing hearing. (See exhibit  
14 K) No new or different factors were introduced at the resentencing hearing  
15 which would justify increasing the Restitution Fine portion of the judgment.  
16 As to the issue of the imposition of a Restitution Fine federal Constitutional  
17 jeopardy had attached at the original sentencing hearing where facts were  
18 litigated, judicial determinations were made, and a lawful sentence was  
19 imposed based upon those determinations. Petitioner's appeal did not call  
20 these determinations into question therefore those matters were not at issue.  
21 The opinion of the state Court of Appeal remanding the matter for resentencing  
22 did not encompass the Restitution Fine. For the sentencing court to have  
23 made factual determinations at the resentencing hearing with the prospect  
24 of imposing a greater Restitution Fine than had been lawfully imposed for  
25 the same conduct violated Federal Constitutional Double Jeopardy Standards.  
26 Arguendo: for the sentencing court to increase a previously lawfully imposed  
27 punishment ten fold based upon no new evidence or factors is arbitrary and

1 exudes the odor of vindictiveness, in violation of petitioner's right to  
2 due process of the law under the 14th Amendment of the Constitution of the  
3 United States.

4 In an attempt to provide a modicum of protection against improper re-  
5 sentencing the United States Supreme Court said "[d]ue process of law ...  
6 requires that vindictiveness against a defendant for having successfully  
7 attacked his first conviction must play no part in the sentence he receives  
8 after a new trial." Pearce, *supra*, 395 U.S. at 725 The Court went on to  
9 acknowledge, "The existence of a retaliatory motivation would, of course,  
10 be extremely difficult to prove in any individual case." Pearce, *supra* 395  
11 U.S. 725 fn. 20.

12 It was specifically to preclude even the appearance of vindictiveness  
13 that California fashioned the "Henderson Rule". (Henderson, *supra*, 60 Cal.2d  
14 482) as referenced above. Several states have adopted the Henderson Rule  
15 on the basis of fundamental fairness.

16 "For the foregoing reasons, even if we were to find  
17 our state double jeopardy clause does not compel the  
holding in Henderson, we would not hesitate to enforce  
the same rule on alternate state due process grounds.  
18 The Alaska Supreme Court reached this conclusion in  
Shagloak v. State (Alaska 1979) 597 P.2d 142. (Cf. State  
19 v. Holmes (1968) 281 Minn. 294, 161 N.W.2d 650, 654  
[precluding increased penalty on resentencing based on  
20 'procedural fairness and principles of public policy  
rather than on constitutional ground'] State v. Wolf  
21 (1966) 46 N.J. 301, 216 A.2d 586 [same under New Jersey  
law]; State v. Turner, *supra*, 429 P.2d at pp. 570-571  
[same under Oregon law].) Translating the rationale of  
22 Henderson into due process terms, the court in Shagloak  
explained that 'if a more severe sentence may be imposed  
after retrial for any reason, there will always be a  
definite apprehension on the part of the accused that  
a heavier sentence may be imposed .... Such deterrence  
23 violated the due process clause of the Alaska Constitut-  
ion. The fundamental standard of procedural fairness,  
which is the basic due process right claimed in this  
24 case, forbids placing a limitation on the defendant's  
right to a fair trial by requiring a defendant to barter  
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1           with freedom for the opportunity of exercising it.  
2           [Citation.] The state has no valid interest in imposing  
3           unreasonable conditions on [a defendant's] legitimate  
4           exercise of his due process right.' Shagloak v. State,  
5           supra, 597 P.2d at p. 145, fns omitted.) We would be  
6           loathe to construe California's due process right to  
7           procedural fairness any more narrowly even if we were  
8           to conform to federal double jeopardy standards." People  
9           v. Hanson 23 Cal.4th 355, 366-367.

10          The relevant facts and procedural history of the Hanson case matches  
11          this case on all four points of the legal compass. In Hanson the defendant  
12          was directed back to the sentencing court for resentencing at which time  
13          the sentencing court increased the original amount of the Restitution Fine  
14          imposed from \$1,000.00 to \$10,000.00. The California Supreme Court indicated  
15          that this violated due process and fundamental fairness. In the instant matter  
16          petitioner asserts that the resentencing court acted in a clearly vindictive  
17          manner by arbitrarily increasing one portion of his original sentence after  
18          what amounts to being directed to reduce a different portion of the original  
19          sentence by the state Court of Appeal after succeeding on appeal. This vind-  
20          ictiveness violates petitioner's federal constitutional right to due process  
21          of the law. A violation which continued right up through the California Court  
22          of Appeal and the California Supreme Court wherein petitioner has made re-  
23          peated efforts to have the illegal portion of his sentence corrected only  
24          to have these efforts thwarted by procedural double talk, misdirection and  
25          avoidance.

26          As set forth in the Procedural History, above, petitioner originally  
27          sought correction of the illegally increased Restitution Fine portion of  
his sentence by submitting a petition for writ of habeas corpus in the  
sentencing court which was denied on March 12, 2007 (Exhibit A). As is pro-  
cedurally required, petitioner exhausted this claim through the California  
Supreme Court and was denied on October 10, 2007. (Exhibit C) Petitioner

1 then sought federal review but was denied on procedural grounds. (Exhibit  
2 D) However, petitioner then became aware of state law which allowed for the  
3 correction of an illegal sentence at any time and without procedural impedi-  
4 ments determined that the speediest remedy was to motion the sentencing court  
5 for the correction of an unauthorized sentence. (See Exhibit L:17-L:23) There  
6 in petitioner cited **People v. Hanson, supra**, which is clearly on point and  
7 binding state authority on the matter. Rather than to correct the sentence  
8 the sentencing court denied the motion stating "Petitioner's claim of error  
9 should have been presented to the Sixth District [Court of Appeal] in either  
10 a direct appeal or in Petitioner's most recent habeas corpus petition H031358.  
11 The matter may not now be considered by the Superior Court." Diane Northway,  
12 Judge of the Superior Court (See Exhibit D; also L-25) The claim was presented  
13 in habeas corpus petition H031358 and, as argued in the motion, the sentencing  
14 court has jurisdiction to correct an unauthorized sentence at any time.  
15 Petitioner properly petitioned the state Court of Appeal for a writ of mandate  
16 to compel the trial court to perform it's duty. (See Exhibit L:27-L:33)  
17 Mandate was denied on February 15, 2008. (See Exhibit F) A Petition For Review  
18 was presented to the California Supreme Court (See Exhibit L) and was denied  
19 on April 9, 2008. (See Exhibit G)

20 Petitioner's increased Restitution Fine is clearly unauthorized under  
21 California state law yet the state courts have failed to act when the matter  
22 has been presented to them. This is vindictive and fundamentally unfair in  
23 violation of the 14th Amendment of the Constitution of the United States.

24 Petitioner is cognizant that federal habeas corpus does not lay to review  
25 errors of state law. (**Estelle v. McGuire** (1991) 502 US 62. There are, however,  
26 exceptions to that general rule. The denial of a state created right can  
27 amount to a constitutional violation of due process. See **Hicks v. Oklahoma**

1 (1980) 447 US 343. Further, the Ninth Federal Circuit Court of Appeal held  
2 that a state court's action which is arbitrary and fundamentally unfair viola-  
3 tes constitutional due process. See *Cooks v. Spalding* (9th Cir. 1981) 660  
4 F2d 738. Still further, the denial of a state law based right constitutes  
5 a violation of constitutional liberty interests under the 14th Amendment  
6 of the Constitution of the United States. See *Fetterly v. Paskett* (9th Cir.  
7 1993) 997 F2d 1295. These circumstances are present in the instant case.  
8 And lastly, there is a sound argument to be made that the arbitrary denials  
9 by the state courts of petitioner's efforts to have his clearly illegal  
10 sentence corrected amounts to subterfuge in order to avoid federal review  
11 of a constitutional violation relying on federal procedural bars rather than  
12 serving fundamental fairness and justice through due process of the law.  
13 See *Oxborrow v. Eikenberry* (9th Cir. 1989) 877 F2d 1395.

14 Petitioner's original \$100.00 Restitution Fine was a lawfully imposed  
15 punishment. The trial court had no jurisdiction to change this lawfully  
16 imposed sentence at resentencing. For the resentencing court to revisit the  
17 matter and increase this portion of the imposed punishment violates federal  
18 and state prohibitions against double jeopardy and exudes the odor of  
19 vindictiveness under the circumstances of this case.

20 As set forth above petitioner's federal constitutional right to due  
21 process of the law and not to be put twice in jeopardy have been violated  
22 by the sentencing. Fundamental fairness requires that petitioner be remanded  
23 back to the sentencing court for correction of sentence.

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1                   CLAIM II  
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PETITIONER SUFFERED INEFFECTIVE ASSISTANCE OF BOTH TRIAL  
COUNSEL AND COUNSEL ON FIRST DIRECT APPEAL IN VIOLATION  
OF THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED  
STATES.

5                   Controlling Principal of Law:  
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The right to the assistance of counsel in a criminal case is guaranteed  
by the Sixth Amendment to the Constitution of the United States. A criminal  
defendant is entitled to the effective assistance of counsel at trial  
[*Strickland v. Washington* (1984) 466 US 668] and on first direct appeal  
[*Evitts v. Lucey* (1985) 469 US 387]. The standards for judging counsel's  
effectiveness were established in *Srtickland v. Washington*, *supra*, (*Strickland*):

"The benchmark for judging any claim of the effectiveness  
of counsel is whether counsel's conduct so undermined  
the adversarial process that the trial cannot be relied  
on as having produced a just result." *Strickland*, *supra*,  
at 723.

"Thus a court deciding an actual ineffectiveness claim  
must judge the reasonableness of counsel's conduct on  
the facts of a particular case viewed at the time of  
counsel's conduct." *Strickland*, *supra*, at 726.

" ... a fair trial is one in which evidence subject to  
adversarial testing is presented to an impartial tribunal  
for resolution of the issues defined in advance of the  
proceeding. The right to counsel plays a critical role  
in the adversarial system embodied in the Sixth Amendment,  
since access to counsel's skill and knowledge is necessary  
to accord defendants the 'ample opportunity to meet the  
case of the prosecution' to which they are entitled."  
[Citation Omitted] *Strickland*, *supra*, at 723.

"That a person who happens to be a lawyer is present  
at trial alongside the accused, however, is not enough  
to satisfy the constitutional command. The Sixth Amendment  
recognizes the right to the assistance of counsel because  
it envisions counsel's playing a role that is critical  
to the ability of the adversarial system to produce a  
just result. An accused is entitled to be assisted by  
an attorney, whether retained or appointed, who plays  
the role necessary to ensure that the trial is fair."  
*Strickland*, *supra*, at 723.

1 In order to prevail on a claim of ineffective assistance of counsel a  
 2 convicted defendant must show not only that counsel was not functioning as  
 3 counsel guaranteed by the Sixth Amendment so as to provide reasonably effective  
 4 but must show that counsel's errors were so serious as to deprive the defendant  
 5 of a fair trial because of the reasonable probability that but for counsel's  
 6 unprofessional errors, the result would have been different. However, it is  
 7 not necessary that the defendant show that counsel's conduct more likely than  
 8 not altered the outcome of the case. (*Strickland, supra, at 726*)

9 The "Strickland Test" applies both to claims of ineffectiveness of trial  
 10 and appellate counsel.

11 Facts and Argument:

12 In the instant case both trial and appellate counsel's ineffectiveness  
 13 is clear and the prejudice suffered is readily apparent. Trial counsel allowed  
 14 petitioner's Restitution Fine to be increased at resentencing without objection.  
 15 Appellate Counsel failed to raise and prosecute this clearly meritorious issue  
 16 on first direct appeal. The irony of appellate counsel is that Petitioner was  
 17 represented by Attorney Mark Greenberg of Berkley California on first direct  
 18 appeal. The very same Mark Greenberg who later argued and the same claim as  
 19 presented herein to the California Supreme Court in *People v. Hanson, supra*,  
 20 and won. That case is based upon the "Henderson Rule" which was also the contro-  
 21 lling law on the matter at the time of Petitioner's appeal. Counsel clearly  
 22 errored in Petitioner's case by failing to raise this issue on appeal which he  
 23 would have won had he presented it, as he did in *Hanson, supra*.

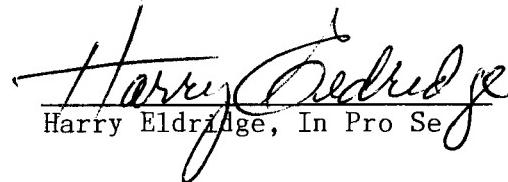
24 For the reasons set forth above both trial and appellate counsel's were  
 25 ineffective in violation of the Sixth Amendment and the matter must be remedied  
 26 accordingly.

1 CONCLUSION  
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For all of the reasons set forth herein the writ must issue and petitioner  
directed back to the sentencing court for the correction of his sentence.

5 Dated: 5-22-08

6 Respectfully submitted:

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8 Harry Eldridge, In Pro Se  
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